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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
STACEY D. LANGLEY,  
Defendant and Appellant.

A103075

(San Francisco County  
Super. Ct. No. 182698)

Appellant Stacey D. Langley shot and killed Tyrie McClellan, the victim, following an altercation at a family birthday party. A jury convicted him of voluntary manslaughter with personal use of a firearm, and of being an ex-felon in possession of a firearm. On appeal, appellant does not dispute firing the fatal shots; instead, he contends that he had been drinking heavily all afternoon and into the evening, and that his voluntary intoxication negated the specific intent or mental state necessary to convict him of voluntary manslaughter under then-applicable law. On this basis, he contends we must reverse his conviction because the trial court informed the jury that voluntary intoxication was not a defense to the crimes of murder and voluntary manslaughter. In supplemental briefing, appellant also contends that the trial court's imposition of aggravated terms on his voluntary manslaughter conviction and the enhancement for firearm use violated his federal constitutional rights under *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531 (*Blakely*). We affirm the judgment and the sentence imposed.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On March 18, 2000, Valerie Gibson and Charles Hammons hosted a joint 21st birthday party for their son and their nephew at the Holiday Inn on Eighth Street between Mission and Market Streets in San Francisco. A large number of family members and friends were in attendance. There was a DJ providing music, and a “no host” bar at which party goers could purchase drinks.

Appellant and his codefendant, Terrance Henderson, arrived together at the party sometime between 11 p.m. and midnight. Appellant was wearing a backward baseball cap, a T-shirt, and very baggy pants that sagged low at his waist so his underwear was visible. They went out on the dance floor, and appellant began “acting up,” allowing his pants to drop below his knees.

Twice while she was dancing, Candace Primus, a cousin of the party honorees, felt someone’s hand on her buttock. Each time, she turned to see that it had been appellant’s codefendant, Henderson, and she asked him not to touch her. Henderson only smiled in response. After the second time, Primus felt something bump against her from behind. She turned, and saw appellant with his pants down to his knees, and with his pubic hair visible. Primus told appellant “That is not cute to me at all.” Appellant simply smiled and pulled his pants up slowly. Later, while she was dancing again, Primus felt someone’s hand touching her vaginal area through her pants. She turned and saw Henderson. She held her hand to his chest, pushed him away from her, looked him in the eyes, and said: “Please stop touching me. Why won’t you stop touching me?” Henderson just smiled at her. Feeling afraid and intimidated by appellant and Henderson, Primus went to tell her brother Tyrone and her aunt what they had been doing to her, and that she was afraid something was going to happen to her.

Primus and her brother witnessed both appellant and Henderson touching and behaving inappropriately with other women at the party. When he saw them doing the same thing to his own girlfriend while he was dancing with her, Tyrone Primus told them: “[w]hy don’t you all stop touching on my girl. Stop touching on my sister, you know. This is a family event. We [are] trying to party here. Why don’t you all be cool.”

Shortly after appellant and Henderson left the party and walked out into the lobby, Candace and Tyrone Primus went out after them. Once outside the ballroom, Tyrone approached appellant and Henderson. He accused them of “touching on” his sister and “everybody” at the party with “disrespect.” Both appellant and Henderson started swearing at Tyrone, saying “Fuck your sister. . . . Fuck your girl. Fuck the party.” Tyrone then asked why they could not “respect” the fact they were “just having a family event.” Appellant responded that Tyrone should have approached them “more like a man.” Ronondo Cooper, a cousin of both Tyrone Primus and victim Tyrie McClellan, told appellant and Henderson the party was over and asked “why don’t [you] go ahead and leave,” but they did not do so. As the situation became more tense, a “crowd” of party guests and family members gathered around; there was a lot of noise, and some “pushing.” Candace and Tyrone Primus went back into the ballroom, preparing to leave. Gibson approached appellant and Henderson, told them she was hosting the party for her son and nephew, announced that the party was over, and asked them to “please leave.” Neither appellant nor Henderson responded to her. Gibson then went back into the ballroom.

After getting their coats, Candace and Tyrone Primus started to leave the party. As they did so, they passed appellant and Henderson. Appellant said: “You all want to end this. This is not over with.” Candace and Tyrone ignored them, and walked out to the front of the building. A hotel representative approached the crowd inside, and it began to disperse and leave the party. Appellant and Henderson also left.

While a group of partygoers was gathered outside the hotel, appellant drove up and got out of the driver’s side of a car as Henderson got out of the passenger’s side. As appellant walked around the car, his shirt opened revealing a gun tucked into his pants waistband on his right side. Several people said “Stay back. They[’ve] got a gun.” Appellant approached Candace and Tyrone Primus and said “What’s up?” When Tyrone responded in kind, appellant said: “You all said you wanted to end it now. Let’s end it.” After Tyrone responded by saying that it was “over with,” “we don’t want no problems with you all,” and “[w]hy don’t you all just leave,” appellant repeated “It ain’t over,” “I’m

about to end this,” “Let’s finish it,” or words to that effect.<sup>1</sup> Candace said, “Well, maybe we all had a little bit too much to drink or something out here.” Henderson replied, “No, ain’t nobody drunk out here. Don’t blame it on no drinks.”<sup>2</sup> Appellant then said, apparently speaking to people standing behind Tyrone, “[y]ou all better get from behind him. You all know what I am about to do.”

Tyrie McClellan, a family member and guest at the party, was standing on the street “a little distance” away from appellant and Henderson. McClellan approached appellant extending his hand, as though to shake hands, and said: “Man, it’s cool. Ain’t nobody tripping.” Appellant said “Man, don’t be coming on the side of me. I don’t know you,” “Nigger, what you trying to sneak up on the side of me,” and “Get the fuck away from me,” or words to that effect. Appellant pulled out a gun from his waist, raised and extended his arm, took aim, and fired a shot. Someone yelled, “He’s got a gun,” and people started to run. McClellan, who had also started to run away, fell to the ground about 15 feet away from appellant. Without apparently changing his aim, appellant fired a second shot. Appellant attempted to continue firing, but the gun appeared to jam. The gun appeared to be a nine millimeter semiautomatic weapon. After appellant attempted to clear the chamber for a moment, he got in the car with Henderson and drove off.

McClellan suffered two gunshot wounds. One bullet traveled completely through his left thigh and lodged in his right thigh, fracturing a bone. The second bullet entered his left temporal forehead region, with fragments exiting his body and other fragments lodged in his brain. As a result of his wounds, McClellan never regained the ability to

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<sup>1</sup> Five different witnesses all testified to appellant’s words to Tyrone Primus outside the hotel. Although their versions of what appellant said varied somewhat, all five included some element of “ending” or “finishing it,” or bringing “it” to a conclusion.

<sup>2</sup> Although Candace Primus replied affirmatively when asked if she had seen appellant exhibit any behavior she would consider that of “someone drunk,” the only behavior she cited for that opinion was appellant’s “[s]miling when [she] asked him not to touch [her]” on the dance floor. On the other hand, she also testified that she did not see appellant drink any alcohol at the party; when he confronted her brother outside the hotel, she could not recall his words being slurred; she did not smell alcohol on his person; and he did not appear to stagger, sweat, or have bloodshot eyes.

speak, breathe unassisted, take care of himself or answer questions, and he was never fully alert. He remained in a persistent vegetative state for over 10 months, until he expired on January 28, 2001. At trial, the San Francisco Chief Medical Examiner testified that McClellan never recovered from the consequences of his gunshot wounds, and on that basis opined that there was no break in the chain of proximate cause between the shooting and his death. Appellant was arrested in Dallas, Texas, on July 6, 2000.

Appellant testified in his own defense. He had previously been shot on September 25, 1999, in his back and elbow, resulting in serious injuries requiring a “[c]ouple of weeks” of hospitalization, several surgeries, the implanting of “screws and pins” in his elbow, reconstruction of his intestines, and the removal of one kidney and his gallbladder. Since being shot, he suffered from paranoia, nightmares, and depression, felt suicidal, and was afraid of loud noises.

In the afternoon on March 18, 2000, appellant attended a neighborhood barbecue, at which he began drinking heavily around 2 p.m. and continued doing so to between 5 and 6 p.m. During the day, Curtis Holden invited appellant to the party that night to be held at the Holiday Inn, at which Holden was one of the birthday honorees. Appellant testified that he continued to drink heavily before he left for the party around 11 p.m. with his friend Henderson. Appellant took a gun to the party, because he felt he needed one “for [his] protection.” He had the gun in the pocket of his leather jacket. Once they arrived, appellant asked the DJ to hold his jacket for him. Appellant then drank some more alcohol. He was also feeling the effects of the alcohol he had been drinking earlier that day. Appellant felt like “having fun and dancing.” Appellant testified that he saw Candace Primus on the dance floor, and “decided to walk up to her and dance with her.” While he was dancing with her, he let his pants fall down to his mid thigh level, because he was “just having fun, being silly.” When Candace told him “it wasn’t cute,” he “immediately pulled [his] pants up.” Appellant denied ever touching Candace, and denied seeing Henderson do so. He testified that he walked off the dance floor and had “[o]ne or two more” alcoholic drinks.

Feeling like he “needed to get some air,” appellant walked off the dance floor and into the hallway with Henderson. In the hallway, several people from the party, including Candace and Tyrone Primus, approached them. According to appellant, Tyrone walked “up into [Henderson’s] face” and said: “What the fuck you doing touching on my sister?” An argument ensued, and other people came out of the ballroom and gathered around, aggressively “coming up in [their] face, [and] backing [them] up.” Appellant felt “scared” and “angry,” and afraid someone had a gun.

Appellant and Henderson left the hotel. As they were driving away from the garage, appellant remembered that he had left his jacket at the party with the gun in it. Appellant had Henderson pull the car over in front of the hotel so he could retrieve his jacket. Appellant denied having his gun at the time, or intending to shoot anyone. When appellant got out of the car, Tyrone Primus saw him and said: “Nigger, you back. Nigger, what’s up?” Appellant testified that he backed up and said: “ ‘Man, I’m not trying to disrespect nobody out here.’ or, ‘I respect my elders.’ ” Tyrone continued to confront him, saying: “Nigger, I end this shit. Nigger, I end this.” Appellant thought people were trying to surround him, and felt afraid. He backed up, saying: “I ain’t got no problems. I ain’t trying to disrespect out here.” Hearing someone mention a gun, appellant thought Tyrone or someone else had a concealed weapon. While this confrontation was taking place, someone came out and told appellant that the DJ had his jacket. Appellant, who was in the street, asked the man to bring it out to him, because in that “hostile” atmosphere, he did not want to have to walk through the crowd to get back into the hotel. The man went back inside, retrieved appellant’s coat, and brought it out to him.

After appellant got his jacket, he put it on slowly, simultaneously trying to watch all the people around him. At that moment, he saw someone “running out of nowhere with his shirt off,” and also noticed McClellan coming up to him “behind” him, sliding step by step in a sideways fashion, with his hand held out. Appellant stopped him and said: “Nigger, what the fuck you trying to creep up on me?” Appellant felt “scared,” “paranoid” and “vulnerable.” He reached into his coat pocket, pulled out the gun, and pointed it toward the person who was closest to him, because that was the one who

“could get to [him] faster.” Appellant fired the gun as he turned and ran back to the car. Appellant could only remember firing the gun once, although he acknowledged he could have fired twice. The next morning, he learned that someone had been shot in the head. Afraid that he would go to prison, appellant destroyed the gun and fled to Dallas, where he was ultimately arrested.

Gregory Merrill, a licensed clinical social worker in the psychiatry department of San Francisco General Hospital, counseled individuals suffering from severe traumatic injury caused by violence. Based on his meetings with and counseling of appellant after the latter was shot and seriously injured in September 1999, Merrill diagnosed appellant as suffering from acute post-traumatic stress disorder. Merrill testified that persons suffering from that disorder, particularly as a result of having been shot, were “very, very sensitive to danger; they feel constantly in danger, they perceive danger everywhere,” and sometimes “arm themselves” with a gun as a result. Merrill counseled appellant that, due to his mental disorder, he posed a danger to himself and others by carrying a firearm.

Based on the bullet fragments removed from the victim, a ballistics expert testified that the bullet that struck his head ricocheted off a very hard surface, such as the sidewalk or pavement, before hitting him. He also opined that at the time he received the head wound, the victim’s head was close to the ground, and about three inches away from the point from which the bullet ricocheted.

Appellant was charged by felony indictment with murder, attempted murder, and being a convicted felon in possession of a firearm, with enhancement allegations of personal use of a firearm and personal use of a firearm causing great bodily injury. On November 19, 2001, the trial court granted appellant’s motion to dismiss the attempted murder count. After jury selection, trial commenced on February 4, 2003. At the conclusion of trial, after instructions and closing argument, the jury deliberated between March 12 and 20, 2003, before returning a partial verdict finding appellant guilty of being a convicted felon in possession of a firearm, and acquitting him of the charge of first degree murder. After further deliberation, on March 24, the jury acquitted appellant

of second degree murder, but found him guilty of voluntary manslaughter while personally using a firearm on the first count.

The probation report stated that appellant had suffered six prior convictions—for firearm possession, possession and purchase of narcotics, criminal threats, domestic violence, and being a convicted felon in possession of a firearm—over a seven year period. It identified six circumstances in aggravation: (1) the crime involved great violence and great bodily injury; (2) appellant used a weapon; (3) appellant has engaged in violent conduct indicating a danger to society; (4) appellant’s prior convictions are numerous and of increasing seriousness; (5) appellant was on probation when he committed the crime; and (6) appellant’s prior performance on probation was unsatisfactory. There were no circumstances in mitigation identified.

At the ensuing sentencing hearing on May 2, 2003, appellant conceded that he had two “circumstances in aggravation that are well-recognized by the California courts”: (1) his criminal history; and (2) his prior history on probation. However, he argued that there were also two factors in mitigation not accounted for in the probation report: (1) victim provocation; and (2) appellant’s fragile mental state at the time of the shooting, based on his post-traumatic stress disorder. On that basis, defense counsel urged the trial court to sentence appellant to the middle term.

In explaining its decision to deny probation and impose the upper term, the sentencing court emphasized its reliance on appellant’s lengthy criminal record, and the fact appellant “has had prior convictions for committing crimes of violence within the recent past preceding this incident,” as well as two prior convictions of crimes involving firearms; appellant’s prior poor performance on probation, and the fact that at the time of the offense he was aware he was on probation for being an ex-felon in possession of a gun with a no-weapons condition; and the fact appellant’s violent conduct indicated that he was a serious danger to society. The trial court rejected the prosecution’s contention that victim vulnerability was an additional aggravating factor; found that the sole factor in mitigation was appellant’s mental state as suffering from post-traumatic stress disorder; and rejected the defense argument that victim provocation was an additional mitigating

factor. Based on the evidence and trial testimony, the trial court concluded that the aggravating factor of appellant's violent conduct and dangerousness to society outweighed the sole mitigating circumstance in setting the aggravated term for his voluntary manslaughter conviction. On this basis, the trial court sentenced appellant to the upper term of 11 years for the voluntary manslaughter conviction.

With regard to imposition of the aggravated sentence on the enhancement found true under Penal Code section 12022.5, subdivision (a)(1) for personal firearm use, the trial court cited the facts that appellant's "criminal history and prior convictions as an adult are numerous and of increasing severity"; and that appellant "was, in fact, on probation for [being an ex-felon in possession of a gun] at the time of this offense, and his performance on probation was, in fact, unsatisfactory." Finding no circumstances in mitigation with respect to the personal use enhancement, the trial court imposed a 10-year term thereon, to be served consecutively to the sentence imposed on the main count. Finally, the court imposed a concurrent three-year term for appellant's conviction on being a convicted felon in possession of a firearm, making a total sentence of 21 years in state prison.

This appeal timely followed.

#### **VOLUNTARY INTOXICATION INSTRUCTION**

The trial court gave the jury an instruction based on CALJIC No. 4.21.1 on voluntary intoxication as it relates to general and specific intent crimes. In doing so, it filled in the blanks in the form instruction with specific references to the crimes charged in this particular case. Appellant contends that as modified by the trial court, the instruction was prejudicially erroneous. We conclude that any error was harmless beyond a reasonable doubt.

In accordance with the form instruction at CALJIC No. 4.21.1, the trial court correctly informed the jury that (1) "[i]t is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition"; (2) "there is an exception to this general rule . . . where a specific intent or mental state is an essential element of a crime," in which case the jury "should consider

the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime"; (3) the crimes of first degree murder, second degree murder and voluntary manslaughter all had as "a necessary element . . . the existence in the mind of the defendant of a certain specific intent or mental state"; (4) "[i]f the evidence shows that a defendant was intoxicated at the time of the alleged crime, [the jury] should consider that fact in deciding whether or not the defendant had the required specific intent or mental state"; and (5) "[i]f from all the evidence [the jury had] a reasonable doubt whether the defendant had that specific intent or mental state, [it] must find that defendant did not have that specific intent or mental state."

In the modification of the form instruction challenged by appellant, the trial court stated as follows: "Thus, in the crime of murder in the first degree charged in Count 1 or the crimes of murder in the second degree and voluntary manslaughter, which are lesser thereto, *the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve defendant of responsibility for the crime. This rule applies in this case only to the crime of murder in the first degree and the lesser crimes of murder in the second Degree and Voluntary Manslaughter.*" (Italics added.) Appellant argues that even though the subsequent paragraphs in this instruction correctly informed the jurors that they *could* consider appellant's voluntary intoxication in deciding whether he had the required mental states for murder or voluntary manslaughter, those subsequent instructions "did not overcome" the prejudicial effect of this preceding portion of the instruction, which specifically told the jury that voluntary intoxication "is not a defense," either to murder, *or* to the lesser included offense of voluntary manslaughter.

The trial court's modifications of this instruction, as given to the jury both orally and in written form, were at the very least highly confusing. CALJIC No. 4.21.1 itself is a perfectly correct jury instruction which accurately sets forth the legal significance of voluntary intoxication with respect to specific intent crimes. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1112; *People v. Aguirre* (1995) 31 Cal.App.4th 391, 401.) However, the language inserted by the trial judge in the second paragraph of the

instruction confuses the general rule with respect to voluntary intoxication applicable to general intent crimes—that it is never a defense—with the exception to that rule, in which voluntary intoxication may be found to negate the required specific intent.<sup>3</sup>

Thus, it was very confusing and apparently contradictory for the trial court to instruct the jury that “in the crime[s] of [first and second degree murder] and Voluntary Manslaughter . . . , the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve defendant of responsibility for the crime”; and then go on to state that the “exception to this general rule” applied to the same crimes just listed, i.e., first and second degree murder and voluntary manslaughter.<sup>4</sup> (*Italics added.*) Moreover, it was clearly *incorrect* for the trial court to tell the jury that the “general rule” that appellant’s voluntary intoxication was not a defense applied in this case “only” to the crimes of first degree murder, second degree murder and voluntary manslaughter; in fact, the stated “general rule” applied most clearly to the *general intent* crime charged in count two, i.e., possession of a firearm by an ex-felon. Read as a whole, the trial court’s modification of the instruction appeared to tell the jury that appellant’s voluntary intoxication was both irrelevant and relevant to the crime of voluntary manslaughter, thereby placing too great a burden on the lay jury’s ability to parse the difference

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<sup>3</sup> At the time of the homicide in this case, the crime of voluntary manslaughter had as a necessary element the specific intent to kill. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87-93; CALJIC No. 8.40; Pen. Code, § 192, subd. (a).)

<sup>4</sup> Ordinarily, if only a general intent crime is charged, only CALJIC No. 4.20 need be given, setting forth the general rule that voluntary intoxication is *not* a defense to such a general intent crime. By the same token, where only a specific intent crime is at issue, only CALJIC No. 4.21 need be given, setting forth the rule that voluntary intoxication is relevant to negating the element of specific intent. Clearly, CALJIC No. 4.21.1 is appropriate for use in cases such as this one, in which both general and specific intent crimes are charged. (See *People v. Saille*, *supra*, 54 Cal.3d at p. 1112; *People v. Aguirre*, *supra*, 31 Cal.App.4th at pp. 397-398, 401.) In this case, however, it appears from the record that the trial court mistakenly inserted the count one charge of first degree murder, with its lesser included offenses of second degree murder and voluntary manslaughter, in *both* the general and specific intent portions of the instruction, when it should have inserted the general intent crime charged in count two—unlawful possession of a firearm by an ex-felon—in the portion of the instruction dealing with general intent crimes.

between (a) a defense, and (b) an evidentiary factor relevant to the existence of a necessary element of the crime.

The People insist that voluntary intoxication is no longer a defense, and is only relevant as creating a legal issue with respect to particular facts in a given case and the specific elements of the offense. As such, it calls for the kind of “pinpoint” instruction to which the defense may be entitled upon request. Because appellant failed to object to the version of the instruction as given, respondent contends appellant has either waived his present claim, or is estopped from making it. Respondent is correct that voluntary intoxication does not technically constitute a “defense,” but instead “is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case the defendant is attempting to relate his evidence of intoxication to an element of the crime.” (*People v. Saille, supra*, 54 Cal.3d at p. 1120.) Nevertheless, the fact that the trial court is not required to give an instruction on voluntary intoxication sua sponte does not mean it may give an incorrect instruction when it does give one. (Cf. *People v. San Nicolas* (2004) 34 Cal.4th 614, 669-670.)

We decline to find waiver or estoppel in this case. Instructional error may be alleged on appeal even though no objection was made in the trial court if the “substantial rights of the defendant were affected thereby.” (Pen. Code, § 1259.) Thus, instructional error is not waived by a failure to object if the asserted instructional error resulted in a miscarriage of justice. (*People v. Martinez* (1999) 20 Cal.4th 225, 231, 241; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) “Accordingly, . . . an appellate court may ascertain whether the defendant’s substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court.” (*People v. Andersen, supra*, 26 Cal.App.4th at p. 1249.)

The next issue is the proper standard for measuring prejudice in this case. Appellant argues that because the trial court’s erroneous or contradictory instruction went to a key legal issue regarding the elements of the offense, this court must apply the

federal standard requiring a determination that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent contends the question of prejudice should be reviewed under the more lenient standard requiring us to determine whether it is reasonably probable a result more favorable to appellant would have occurred in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We agree with appellant. Because the instructional error relates to an essential element of the crime of which appellant was charged, it directly implicates the jury's consideration of appellant's guilt or innocence of the crime charged, and the prosecution's burden of proving appellant's guilt beyond a reasonable doubt. The federal standard of review therefore applies. (*Rose v. Clark* (1986) 478 U.S. 570, 580-582; *People v. Macedo* (1989) 213 Cal.App.3d 554, 561, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027, 1040.)

We nevertheless conclude that the error was harmless beyond a reasonable doubt. In the first place, the instruction cannot be considered in artificial isolation, but rather must be analyzed in the context of the other instructions given and trial record as a whole. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) The trial court correctly instructed the jury on the presumption of innocence and the necessity of proof beyond a reasonable doubt; the elements of first and second degree murder; manslaughter, both voluntary and involuntary; justifiable homicide in self-defense; imperfect self-defense reducing murder to manslaughter; malice aforethought; and sudden quarrel or heat of passion and provocation. During their respective closing arguments to the jury, both defense counsel and the prosecutor discussed the legal significance of voluntary intoxication with respect to the intent requirements of first and second degree murder and voluntary manslaughter. As a result, the jury was thoroughly informed on the proper treatment of voluntary intoxication in their deliberations, despite any confusion arising from the trial court's instruction. (Cf. *People v. Castillo* (1997) 16 Cal.4th 1009, 1017.)

The evidence supporting appellant's intent to kill was overwhelming. As found by the jury beyond a reasonable doubt, appellant came to the party armed with a gun. While

there, he behaved rudely and obnoxiously to numerous people, and became unduly defensive when approached about his behavior. After he left, he voluntarily returned and again confronted the party goers antagonistically outside the hotel. No fewer than five different witnesses all testified to his threatening words to Tyrone Primus and the others gathered outside the hotel after the party. Appellant's repeated statements about the dispute or altercation between them not being "over," and the necessity of "ending" or "finishing it," or bringing "it" to a conclusion, clearly evidenced his specific intent to bring the confrontation to a head. Appellant's statement—reported by at least two witnesses—warning people to "get from behind" Tyrone Primus because of what appellant's was "about to do," is further confirmatory evidence of this specific intent. The uncontested evidence shows that appellant reached for his gun, deliberately pointed it at the victim with his arm extended, and fired. Such a deliberate shooting of a firearm at an individual is inherently dangerous to human life, and "permits—virtually compels"—a finding of intent to kill. (*People v. Bland* (2002) 28 Cal.4th 313, 317, 330-331; *People v. Lee* (1987) 43 Cal.3d 666, 679.) The testimony of appellant's ballistics expert that the bullet which entered the victim's brain had ricocheted off the ground three inches away from his head supports the conclusion the decedent was already on the ground when he was shot, from which it is reasonable to infer that appellant aimed at the victim's head when he shot him.

Moreover, this evidence does *not* support a conviction of involuntary manslaughter based on voluntary intoxication. Nothing in the record supports a conclusion that appellant was so drunk when he shot the victim that he was unconscious of what he was doing. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 423-424; Pen. Code, §§ 26, 192, subd. (b).) By appellant's admission, he knew exactly what he was doing; namely, firing at the person nearest to him in order to escape the situation. There was no evidence that appellant smelled of alcohol, or that he was staggering when he walked, or slurring his words when he spoke. Appellant himself told witnesses at the scene that "nobody [was] drunk out here," and not to "blame" the confrontation on "drinks." Appellant's own testimony at trial indicated that he recalled the events

surrounding the incident with remarkable clarity, and described them with considerable detail. The jurors' notes to the trial judge during deliberations sought clarification of the terms "intent to kill" and "specific intent" as they related to voluntary manslaughter; there were *no* questions posed from the jury indicating any confusion about the effect of appellant's alleged voluntary intoxication. Rather than supporting a conviction of involuntary manslaughter by reason of voluntary intoxication, the record fully supports the jury's verdict of voluntary manslaughter based on appellant's unreasonable belief in his need for self defense, or the heat of passion. We have no reasonable doubt the jury would have convicted appellant of voluntary manslaughter in the absence of the error in the trial court's jury instruction on voluntary intoxication.

#### SENTENCING ISSUES UNDER *BLAKELY*

In supplemental briefing, appellant argues that the trial court's imposition of the aggravated terms on his convictions for voluntary manslaughter and the use enhancement, and the consecutive sentence for the latter, were in violation of his federal constitutional rights to a jury trial, proof of guilt beyond a reasonable doubt, and due process under the United States Supreme Court's recent opinions in *Blakely, supra*, 124 S.Ct. at p. 2536, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.<sup>5</sup> We conclude that any *Blakely* error was harmless beyond a reasonable doubt.

We must first address the issue of waiver or forfeiture. Respondent contends appellant forfeited his *Blakely* claims by failing to raise them below. In our opinion, sentencing issues arising under *Blakely* present questions of fundamental constitutional rights; an objection in the trial court would have been futile under the law as it stood before *Blakely*; and we have discretion to consider issues that have not been formally preserved for review. It is inappropriate to apply forfeiture to *Blakely* claims in cases

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<sup>5</sup> We granted appellant's request for supplemental briefing on the sentencing issues arising under *Blakely*. Presently pending before the California Supreme Court are cases raising the questions whether *Blakely* precludes a trial court from making findings on aggravating factors in support of an upper term sentence, and if so, what standard of prejudicial error applies (*People v. Towne*, review granted July 14, 2004, S125677); and

where sentence was imposed before the new rule came into existence. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 456, fn. 9.)

We also reject respondent's contention that the *Blakely* rule has no application to the choice of an aggravated term under California's determinate sentencing scheme. Respondent has not cited us to any cases supporting this position. (Cf. *People v. Earley* (2004) 122 Cal.App.4th 542, 549-550.) The prescribed "statutory maximum" penalty for purposes of *Blakely* is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

[Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Blakely, supra*, 124 S.Ct. at p. 2537.) The maximum determinate sentence a trial court can impose under California law without making any additional findings is the middle term. *Blakely* therefore necessarily applies to aggravated terms, which require such additional findings. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(c) & (d).)<sup>6</sup>

In this case, the trial court imposed aggravated terms on the voluntary manslaughter conviction and the firearm use enhancement based on the following factors: (1) appellant's record of prior criminal convictions for crimes of violence; (2) his previous poor performance on probation; (3) the fact he was on probation for being an ex-felon in possession of a gun with a no-weapons condition at the time of the current offense; and (4) the fact his violent conduct indicated that he was a serious danger to

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whether *Blakely* affects the imposition of consecutive sentences (*People v. Black*, review granted July 28, 2004, S126182).

<sup>6</sup> In a very recent opinion, the United States Supreme Court extended its Sixth Amendment analysis in *Apprendi* and *Blakely* to the selection of particular sentences under the federal sentencing guidelines; and then concluded that the *mandatory* nature of those guidelines, as prescribed by federal law, was incompatible with the constitutional jury trial requirement of *Blakely*. (*United States v. Booker* (2005) \_\_\_ U.S. \_\_\_, 125 S.Ct. 738, 744-745, 755-756.) The question of *Booker*'s effect on *Blakely*'s applicability to California sentencing law is not now before us.

society. Appellant himself admitted two of these aggravating factors at the sentencing hearing, namely his prior history on probation, and his criminal history. In any event, *Blakely* does not require the fact of a defendant's prior convictions to be found by a jury. Appellant's status as a probationer at the time of this offense having arisen directly from the fact of his prior conviction, we conclude that it is a recidivism-related factor essentially analogous to a prior conviction and did not require being tried to and found by a jury beyond a reasonable doubt. (*Blakely, supra*, 124 S.Ct. at pp. 2536-2537, 2540; *Apprendi, supra*, 530 U.S. at p. 488.) We must review the remaining factors—appellant's poor performance on probation and the danger to society represented by his violent conduct—to determine whether, beyond a reasonable doubt, the jury would have made the same findings in their absence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

We need not undertake this analysis in this particular case, however. Even if for the sake of argument we assume that it was error for the trial court to have cited as aggravating factors appellant's poor prior performance on probation and his violence and danger to society, we are still certain it would have imposed the same aggravated term. In its extensive comments at the sentencing hearing, the court indicated that its concern with appellant's violent behavior was based not solely on his actions in this particular incident, but on his prior history of committing violent crimes and using guns. Thus, the trial court could have legitimately imposed the aggravated term on appellant's voluntary manslaughter conviction based on the aggravating factor of appellant's prior criminal history, without reference to the factor of danger to society, while still basing the aggravated term on the firearm use enhancement on his status as a probationer without running afoul of improper dual use. On this record, it is not reasonably probable the trial court would have imposed a lesser sentence had it known it was improper for it to rely on the aggravating factors of appellant's probationary performance and his danger to society. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Any *Blakely* error underlying appellant's aggravated terms was therefore harmless.

Respondent is correct that *Blakely* has no application to imposition of consecutive sentences. The determination to impose consecutive sentences is made only after a defendant has been found guilty of separate crimes beyond a reasonable doubt. The “statutory maximum” for *Blakely* purposes is not violated if the defendant serves his terms consecutively. A defendant who commits separate crimes has no legal right to concurrent sentences, “and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.” (*Blakely, supra*, 124 S.Ct. at p. 2540.) Thus, appellant’s consecutive sentences did not implicate the concerns addressed in *Blakely*.

#### **DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

I concur:

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Parrilli, J.

POLLAK, J., Concurring.

With respect to the sentencing issues discussed in the final section of the majority opinion, I agree with footnote 6 (maj. opn., *ante*, p. 17) that the impact of the most recent decision of the United States Supreme Court bearing on these issues, *United States v. Booker* (2005) \_\_\_ U.S. \_\_\_ [125 S.Ct. 738], not having been addressed by the parties, is not now properly before us for consideration. Nonetheless, it must be recognized that because imposition of the aggravated term under California's Determinate Sentencing Law is discretionary regardless of the presence of factors in aggravation, *Booker* may ultimately be held to have rendered *Blakely v. Washington* (2004) 542 U.S. \_\_\_ [124 S.Ct. 2531] (*Blakely*) irrelevant to California's sentencing scheme.

On the assumption that *Blakely* does apply, I also agree with the majority that "any *Blakely* error was harmless beyond a reasonable doubt." (Maj. opn., *ante*, p. 16.) However, on this assumption, there are two statements in the majority opinion with which I disagree. First, if the court has imposed an aggravated term based in part on factors properly considered under *Blakely* and in part on factors prohibited by *Blakely* absent an admission or jury finding, I do not believe that upon review, the issue is ever whether "the jury would have made the same findings" on those factors as did the judge. (Maj. opn., *ante*, p. 18.) The issue of harmless error turns not on whether the jury would have made the same factual findings as the judge, but on whether in the absence of those factors that could not be considered without a jury finding the judge would have imposed the same sentence. Since in such a case the error is the court having considered certain facts that it was not permitted to consider, the potential prejudice from such an error is evaluated by determining whether the sentence the court imposed would have differed if those facts had not been considered. (Cf. *People v. Harris* (1994) 9 Cal.4th 407, 426.) It is not determined by speculating on the outcome of a jury trial that did not occur. (See, e.g., *Pope v. Illinois* (1987) 481 U.S. 497, 509-510 (dis. opn. of Stevens, J.) ["It is

fundamental that an appellate court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury *would* have found something it did not find”]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-280 [“Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which ‘the jury *actually rested* its verdict.’ [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee”].)

Secondly, I do not believe that the standard for making this determination is whether it is “reasonably probable the trial court would have imposed a lesser sentence had it known it was improper for it to rely on” the aggravating factors requiring jury findings. (Maj. opn., *ante*, p. 18.) The majority opinion cites *People v. Osband* (1996) 13 Cal.4th 622, 728 for this standard of harmless error which is, of course, derived from *People v. Watson* (1956) 46 Cal.2d 818, 836. This standard is appropriate when the court’s error lies in considering a factor precluded by state law, such as the dual consideration of the same factor as an enhancement and as an aggravating factor. (See *People v. Osband*, *supra*, 13 Cal.4th at p. 728; *People v. Avalos* (1984) 37 Cal.3d 216, 233.) However, in the case of a *Blakely* error, the error lies in considering a factor precluded from consideration by the federal constitution, so that the error may be considered harmless only under the more stringent beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; see also, e.g., *People v. Flood* (1998) 18 Cal.4th 470, 492-504;

*People v. Lee* (1987) 43 Cal.3d 666, 671-676; *People v. Moreno* (1991) 228 Cal.App.3d 564, 573.) If the reviewing court cannot determine with that high degree of certainty that the sentence would have been the same if the court had disregarded impermissible factors, the case must be remanded to the trial court for resentencing.

Because I believe that the circumstances in this case warrant the level of confidence required by *Chapman v. California, supra*, 386 U.S. 18, I concur in the affirmance of the sentence imposed.

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Pollak, J.